



Office of the Attorney General
State of Texas

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May 19, 1994

Honorable Ciro D. Rodriguez
Chair
Committee on Local and Consent Calendars
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 94-47

Re: Whether under *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), it is constitutional for the State of Texas to impose a certification or licensing fee for a person to pursue his or her chosen profession (ID# 24971)

Dear Representative Rodriguez:

You ask whether it is constitutional for the State of Texas to impose a certification or licensing fee for a person to pursue his or her chosen profession. You ask this question in light of two United States Supreme Court cases: *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). You state as follows:

In *Allgeyer v. Louisiana* . . . the Supreme Court stated that a citizen has the right to be free to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to carrying out to a successful conclusion in the purposes above mentioned. Additionally, in . . . *Murdock v. Pennsylvania* . . . the Supreme Court expanded upon this and held that, "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." [Citations omitted.]

Your letter assumes that these cases hold that a person has a right under the United States Constitution to pursue his or her chosen profession free of a state-imposed fee. We conclude that neither case supports such a proposition.

Allgeyer, a case dating from 1897, suggests that the due process clause of the Fourteenth Amendment guarantees a right to contract free of any state regulation. Since the 1930s, however, the federal courts have moved away from this approach. "At one time 'liberty of contract' was recognized as a major, if not the major, component of the liberty guaranteed by the fourteenth amendment. See, e.g., *Allgeyer v. Louisiana*, 1897, 165 U.S. 578 That is no longer the case." *Plante v. Gonzalez*, 575 F.2d 1119, 1131 (5th Cir. 1978) (citations partially omitted). The United States Supreme Court's

"inclusion of the right to contract as a liberty interest [in *Meyer v. Nebraska*, 262 U.S. 390 (1923),] apparently rested on a line of cases, applying substantive due process analysis to contract rights, which the Court subsequently abandoned. . . . See . . . *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)." *Dr. Pepper/Seven-Up Cos. v. Federal Trade Comm'n*, 798 F. Supp. 762, 774-75 n.13 (D.D.C. 1992) (citations partially omitted). Given that the *Allgeyer* Court's understanding of the Fourteenth Amendment has been disavowed subsequently by federal courts, we do not believe that it is reliable authority.

Nor does *Murdock v. Pennsylvania*, the second case you cite, support the proposition that a person has a right under the United States Constitution to pursue his or her chosen profession free of a state-imposed fee. In *Murdock*, the Court considered the constitutionality of a town ordinance that required Jehovah's Witnesses who went door to door distributing literature and soliciting people to purchase religious materials to obtain a license. This conduct constituted a religious practice. 319 U.S. at 109. The Court concluded that the licensing fee "is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise." *Id.* at 114. The Court concluded that the town could not impose a tax on the exercise of a First Amendment right. Because the First Amendment does not include a right to pursue one's chosen profession free of a state-imposed fee, we do not believe that *Murdock* can be construed as your letter suggests.

Finally, we note that it is well-established that the State of Texas is authorized to reasonably regulate the professions and to charge licensing and certification fees. See generally *Texas State Bd. of Pub. Accountancy v. Fulcher*, 515 S.W.2d 950 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); 10 TEX. JUR. 3d *Business and Occupation Licenses* §§ 10-19 (1980). We do not believe that there is any question that the State of Texas generally may impose a certification or licensing fee for a person to pursue his or her chosen profession.

S U M M A R Y

The State of Texas generally may impose a certification or licensing fee for a person to pursue his or her chosen profession.

Yours very truly,



Mary R. Crouter
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Opinion Committee